(3)

No. 02-319

Supreme Court, U.S.
FILED
DEC 4 2002
OFFICE OF THE CLERK

In The Supreme Court of the United States

DONTE PITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Fred Warren Bennett, Esq.
BENNETT & NATHANS, LLP
6301 Ivy Lane, Suite 419
Greenbelt, Maryland 20770
(301) 220-1570

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

10 pp

TABLE OF CONTENTS

REPLY ARGUMENT 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: **Page**

Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998) ... 1

Steagald v. United States, 451 U.S. 204 (1981). 5

United States v. Kelly, 35 F.3d 929, 933-934 (4th Cir. 1994). 1

REPLY TO THE UNITED STATES' OPPOSITION TO GRANTING THE WRIT

Petitioner files this reply to address three of the United States' contentions which are either unsupported by the factual record or which arise from an incomplete reading of the record.

1. The United States contends this Court should not grant a writ of certiorari because resolving the split in the circuits, regarding the degree to which knowledge of a law enforcement witnesses' perjury is attributed to the prosecution, would not change the outcome of this case. It contends that if the circuit split were resolved in Petitioner's favor by attributing the perjury of the United States' expert witness, Johnny St. Valentine Brown, to the prosecution, Petitioner would still not be entitled to relief because the expert's testimony was immaterial to the jury's verdict. Opposition at pp. 9 - 10 (contending that St. Valentine Brown's perjury could not have affected the jury's verdict). However, the United States' claim is unsupported by the record. Applying the proper materiality standard to evaluating the impact of the expert's perjury on the jury's verdict would compel relief in this case. The proper standard advocated by Petitioner and applied by the Fourth Circuit in *Boyd v. French*, 147 F.3d 319, 329-330 (4th Cir. 1998), and *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994), requires a new trial if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Petition at pp. 7 - 8.

No court has ever applied the correct standard to evaluating the effect of the expert's perjury on the verdict in this case. If a court does apply the right

standard, it will require a new trial. The United States mistakes the substantial trial evidence that someone was engaged in drug trafficking at the residence police searched in Temple Hills, Maryland, with the evidence that Petitioner personally conducted a large scale drug trafficking operation there. The United States did not need the expert's testimony to show that the residence was used to process large amounts of crack cocaine. However, in a case where it had no informant or co-conspirator testimony regarding drug processing at the residence, and where many other people had access to and spent time in the residence, the United States desperately needed the expert's testimony to connect Petitioner to the drug operation itself and not merely to the residence through a lease.

The expert's testimony provided the Government's crucial link between Petitioner and the drug processing operation as only his testimony connected Petitioner to items in the residence which the expert testified were used for processing narcotics. Furthermore, the credibility of the expert's testimony connecting the items to Petitioner relied on the expert's bogus academic credentials relating to production of narcotics, not solely on the expert's street knowledge.

The United States recognized the critical importance of the credentialed narcotics expert's testimony to its proof by insisting that the District Court allow the jury to hear his testimony. 10/25/96 T. 27-31. When defense counsel challenged the relevance of the expert's testimony, the Government told the District Court at trial that "we think it's very necessary for the jury to understand the process [of producing crack] and

how it gets here." 10/25/96 T. 28. "He's [the expert] going to testify about manufacturing." 10/25/96 T. 29. The AUSA told the District Court that the expert's testimony was "very relevant to the $300,000 that was found in the house, 200 boxes of baking soda, the residue that was found." 10/25/96 T. 27. The AUSA also told the district court that the expert would "testify about the chain [of distribution]. He's going to testify about manufacturing. He's going to testify about protection measures... all these things are relevant based on everything that was found in the house." 10/25/96 T. 29-30.

Contrary to the United States' claim, the expert's testimony was essential to the Government's proof. Since there is a reasonable likelihood that the expert's testimony could have affected the judgment of the jury, determining the proper materiality standard is vital to the outcome of this case, and once applied to the facts the proper standard will compel a new trial.

2. The United States claims that procedural default bars relief on the expert perjury claim. Opposition at pp. 8 - 9. Ignoring its role and responsibility in presenting perjured testimony by the expert in many cases year after year, including Petitioner's case, the United States faults Petitioner's trial counsel for not catching its' own expert witnesses' perjury earlier. Id. It cites no authority that the defense is required to extract prior to trial, from nonpublic records using subpoenas, evidence pertaining to the credentials of the United States' expert witness. The United States had the burden of eliciting truthful testimony from its expert, and the burden was not on the defense to discover

prior to trial that the United States had routinely offered false testimony from its expert.

In addition to the oddity of the United States' claim that the defense should have blown the whistle on perjury by its expert earlier than it did, this Court should in its discretion decline to address an alleged procedural default in deciding whether to issue the writ.

First, as a consequence of the United States' failure to litigate this issue below, there is no evidentiary record regarding any alleged procedural default. There is no evidence in the post conviction record that, as the United States claims, "petitioner had an opportunity to investigate Brown and to discredit his testimony at trial." Opposition at p. 9. There is no evidence of when the expert's resume was received by trial counsel. There is no evidence that given the United States' use of that expert in case after case before Petitioner's trial that investigating the expert's credentials prior to trial would have been a reasonable step for trial counsel to take. The expert's perjury was discovered in unrelated civil litigation in the District of Columbia after the verdict in this case when his credentials were investigated in connection with civil discovery. Civil discovery offers far more effective means of investigating an expert's credentials than do the Federal Rules of Criminal Procedure. Thus, there is no proper factual basis on which to find procedural default.

Second, if as the United States blithely contends, discovering the expert's perjury would have been so easy, then surely the United States would have uncovered the expert's perjury long ago and avoided the ensuing debacle with the witnesses' perjurious testimony.

Third, as the United States admits, Opposition at p. 8 n. 1, it failed to properly raise and preserve a procedural default claim below. The United States should not be permitted to sandbag the judicial system and raise on appeal before this Court issues it failed to fully litigate below before the District Court or the Fourth Circuit. *See* Steagald v. United States, 451 U.S. 204 (1981).

For these reasons, this Court should in its discretion decline to address the Government's claim that procedural default bars the claims arising from the expert's perjury.

3. The United States contends that this Court should not grant a Writ of Certiorari because the District Court properly denied an evidentiary hearing on Petitioner's claim that trial counsel provided ineffective assistance of counsel regarding plea offers. Opposition at pp. 10-12. The United States claims that there was no material question of fact to be decided at an evidentiary hearing on this issue, and that the District Court denied a hearing based on undisputed facts. Id. The United States is wrong that differences between Petitioner and the United States on this issue were immaterial, justifying denial of an evidentiary hearing.

Petitioner's affidavit, Ex. 6 to his Section 2255 Petition, stated that but for the advice he received from trial counsel that his sentence could be enhanced beyond approximately 12 years incarceration due to hundreds of cocaine wrappers found in the Temple Hills residence, he would have accepted the United States' plea offer. Ex. 6 to Section 2255 Petition. On the other hand, based on the contradictory affidavit of trial counsel, the United

States argued to the District Court that "[t]he record indicates that Pitt wanted no part of a plea agreement." Government's Opposition to Defendant's Motion to Vacate Sentence Pursuant to 2255, filed October 5, 2000, at p. 29; see also id. at Ex. A (Affidavit of trial counsel Kenneth Robinson claiming that Petitioner rejected offer providing for a guaranteed cap of five years, avoiding issue with drug wrapper enhancement).

The contrast between these two factual claims could not have been clearer. Petitioner contended that absent trial counsel's advice regarding the possibility of an enhanced sentence, he would have pleaded guilty to a charge carrying more than ten years incarceration, while trial counsel claims Petitioner declined a proposal providing for no more than five years incarceration and no risk of a higher sentence. The District Court, and by adoption the Fourth Circuit, held on the affidavits alone that the Government claims were more persuasive. Memo. Op. at 13 (App. 15a) ("this Court believes it is clear from the record's documentation of correspondence between trial counsel and the Government, that trial counsel had performed adequately in attempting to negotiate a plea agreement"). This factual finding of the District Court is clearly related to the disputed facts because if, as trial counsel and the United States contend, Petitioner was uninterested in any plea offer, even one offering as few as five years incarceration, the advice Petitioner received regarding a plea offer providing for more than ten years incarceration could not have been ineffective.

In addition to erroneously claiming that there were no differences between the Petitioner's and the United States' material facts regarding the plea offers, the United States also claims that "Petitioner does not argue that his trial counsel provided legally erroneous advice or unreasonably suggested the possibility of a sentence enhancement." Opposition at p. 12 n. 3. Petitioner's issue for this Court set forth in the Petition is the trial court's error in denying an evidentiary hearing on a disputed question of fact, not the disputed question of fact itself which is implicit in the question presented to this Court. The underlying ineffective assistance of counsel claim, which cannot be resolved without an evidentiary hearing, is that "[t]rial counsel inadequately advised Mr. Pitt regarding the possible sentence he would receive following entry of a guilty plea in response to the Government's two (2) plea offers." Amended Section 2255 Petition filed September 6, 2000, at p. 7. In support of this claim, Petitioner would show at an evidentiary hearing that it was objectively unreasonable, based on local practice in the District Court, for trial counsel to tell Petitioner that there was any risk that the Probation Office or the District Court would go beyond a negotiated stipulation on drug quantity. At a hearing Petitioner would show that with a plea agreement and stipulated facts there would have been no evidence in the case for the Probation Office or the District Court to rely on in rejecting the drug quantity set forth in the proposed plea agreement.

The United States' argument appears to be that the Petition did not set forth all of the details of the ineffective assistance of counsel claim which should

have been resolved in an evidentiary hearing. Petitioner properly framed the question before this Court, which is the circumstances in which an evidentiary hearing is required on a Section 2255 claim involving disputed material facts. The absence of a full discussion of the plea agreement claim in the Petition does not waive any aspect of the underlying claim that trial counsel misadvised Petitioner on the plea offers.

CONCLUSION

For the foregoing reasons, Petitioner Donte Pitt respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. This is the proper case to address the two compelling issues raised in the Petition: the circumstances for the purposes of post conviction relief in which knowledge of a police officer's perjury is imputed to the prosecution, and the circumstances in which a District Court must conduct an evidentiary hearing to resolve an ineffective assistance of counsel claim.

Respectfully submitted,

Fred Warren Bennett, Esq.
Bennett & Nathans, LLP.
6301 Ivy Lane, Suite 419
Greenbelt, MD 20770
301-220-1570
Counsel for Petitioner